No. 12,494

IN THE

United States Court of Appeals

For the Ninth Circuit

F. E. LEITNER, also known as S. F. Leitner, also known as Frederick Leitner, RAPHAEL PORTA, and WILLIAM E. BARDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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Table of Authorities Cited

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ARGUMENT.

I.

As appellee has pointed out appellants specified three points on which they intend to rely on this appeal, mainly:

(1) The motion for summary judgment was improper because there was a genuine issue of material fact.

(2) The record shows that the premises involved were decontrolled because they were not

rented from February 1st, 1945 to March 30th, 1948, both dates inclusive.

(3) The interrogatories proposed by appellants and ordered stricken by the court were properly directed to issues of material facts in the case.

Appellee declares that appellants' brief is directed solely to a slightly modified version of their second point, namely, that the premises were decontrolled because they were not rented for twenty-four consecutive months between February 1, 1945 and March 30, 1948 and that appellants must therefore be considered to have abandoned points 1 and 3.

Both parties agree that the controlling question on this appeal is whether or not the premises known and designated as 1760-A Filbert Street, San Francisco, California, were "rented" in spite of the fact that the tenant occupying the premises namely, Emmanuel G. Leres, was a servant of the then owner of the premises Mr. A. Marchetta and received the apartment as part of his compensation.

Appellee admits that in considering whether or not the pleadings, affidavits, admissions and answers to interrogatories presents solely a question of law, if there is any conflict of the affidavits the affidavit of the appellants must be taken as true. (Appellee's Brief, pp. 5 and 6.)

This is another way of stating that if upon the facts shown in appellants' affidavit the law gives them a defense to appellee's action and if the facts

stated in appellants' affidavits are contradictory to the facts stated in the papers relied upon by appellee a question of material fact does exist.

Such is the situation here. There is a direct conflict between the facts relied upon as disclosed by the papers filed in support of appellee's motion for summary judgment and the facts relied upon by the appellants as disclosed by the affidavits in opposition to the motion for summary judgment. The District Court of Appeal recognized this but declared "but that, assuming the facts to be as alleged or admitted by the appellants the only question remaining is one of law. This appears to be the case, and the only question for this Court is whether, under the applicable sections of the statute, the premises in question were subject to maximum rental ceiling during the period of January 1st, 1948 to and including February 1st, 1949."

We pointed this out in our opening brief when we stated the rule to be that a summary judgment can only be granted where there is no genuine question of material fact and the sole question remaining is one of law for the Court. (Appellants' Opening Brief, p. 3.)

We pointed it out further when we stated that under that rule the Court was required to take as true the testimony contained in the affidavit of appellants in opposition to the motion for summary judgment in determining whether or not the sole issue was one of law. That statement is true where there is a conflict in the testimony disclosed by the papers on file and

considered by the Court in determining the propriety of a motion for summary judgment.

We have therefore urged upon this Court that a material question of fact does exist between the parties and that the sole question before the Court is not one of law. Of course, our subsequent discussion as to whether or not, under the facts disclosed by appellants' affidavit in opposition to the motion for summary judgment there existed the relationship of landlord and tenant or solely that of employer and employee refers back and relates to the one question namely, whether or not there exists a material question of fact.

As to the third point on appeal namely, the point relative to the interrogatories proposed by appellants no argument is needed to be advanced to this Court on that issue for the reason that if the motion were improperly granted the District Court's action in striking the interrogatories was error. If, in fact, there was no renting as contemplated by the Housing and Rent Control Act of 1947, then the District Court erred in striking the interrogatories of appellants. The Court's action in that regard stands or falls upon a decision of the main question involved in this appeal.

Under those circumstances therefore can it be considered that the appellants have abandoned points one and three on this appeal.

II.

Appellee in advancing the contention that where an employee is hired by his employer and given living quarters either in the form of a room or an apartment as all or part of his compensation, such a payment of wages by the employer in fact constitutes rent, rest its position mainly upon the interpretation of the Housing Expediter as set forth on page 9 of its brief. In resting upon this interpretation it quotes the familiar rule that an administrative interpretation of law must be given great weight whereas the duty of the administrative officer or body is to interpret the law and act under it unless the interpretation is plainly erroneous or inconsistent with the law.

In this case the interpretation relied upon is contrary to the established law. It must be remembered that the Housing and Rent Control Act of 1947 has not set up different rules for the creation of a landlord tenancy relationship than has heretofore existed under the local law. It has merely sought to regulate that relationship after it has once been created.

This is evidenced by the definitions contained in the act itself. Thus section 202(e) of the Housing and Rent Act of 1947, provides:

> "The term 'rent' means the consideration, including any bonus, benefit or gratuity demanded or received *for or in connection with the use or occupancy of housing accommodations, or the transfer of a lease of housing accomodations.*"

In 15 Cal. Jur. 600 rent is defined as follows:

> "In the broad legal sense of the term, rent is a return or a compensation for the use of property, or, as used in this article of real property."

There is therefore no change in the relationship of landlord and tenant under the Rent and Housing Act of 1947 which was unknown to the local law. It is therefore apparent that Congress had no intention to create a relationship different from that known under the local law and the definitions and rules of law existing at the time of the enactment of the Housing and Rent Act of 1947 still prevail in determining whether the relationship of landlord and tenant exists.

That being so the law laid down in *Maio v. Borrell,* 83 N.Y.S. (2d) 532, and in *Prince v. Davis,* 87 N.Y. Supp. (2d Series) 600, applies in determining whether or not the relationship of landlord and tenant exists under the facts as disclosed by the affidavits of the appellants in the proceeding on summary judgment.

These cases, although lower state Court opinion, declare the law as it has existed in the various states through the Union. That law is declared in 35 Corpus Juris, 955, Section 13, as follows:

> "The relation of landlord and tenant is clearly distinguishable from that of master and servant, the principal distinction being in the possession by the tenant of an estate in the demised premises, which is lacking in the case of a servant. The question depends upon the nature of the holding, whether it is exclusive and independent of, and in

no way connected with, the service, or whether it is so connected, or is necessary for its performance. The right of occupancy or possession of a servant or employee under his contract of employment or service such as is necessary for, or incident to, the performance of the services to be rendered by him, does not create the relation of landlord; nor, wherein employee is allowed to occupy his employer's premises does he become a tenant, in case the employer reserves general control and supervision over the premises so occupied."

In this case the affidavit of appellants, with the affidavit of Leo Marchetti, attached, shows that the occupant of the premises 1760-A was employed as a manager of the apartment house of 1760-1770 Filbert Street and that he occupied apartment 1760-A Filbert Street as compensation for his employment; that his duties were that of manager of that complete apartment house and his duties are set forth in some detail in the affidavit of Leo Marchetti.

It therefore appears,

First: That he was an employee of Leo Marchetti; Second: That his compensation was the use of this apartment; Third: That the occupancy of the apartment was necessary to the performance of his duties as manager and incidental to his employment as manager, it being necessary inasmuch as his presence was always required in the apartment and it being incidental since it was a part of his compensation and he would only have received the use of the apartment as

an employee and not otherwise; Fourth: The employer retained control over the apartment because since the relationship of landlord and tenant did not exist the employee was required to surrender possession of the apartment whenever the employer terminated the master and servant relationship.

Under the circumstances therefore disclosed in the affidavits of the appellants herein there was no relationship of landlord and tenant but a relationship of employer and employee. Under the express provisions of the Housing and Rent Control Act of 1947, since the apartment in question had not been rented for the twenty-four-month period specified by that Act this apartment was decontrolled and the judgment should be reversed.

Dated, San Francisco, California,
June 21, 1950.

Respectfully submitted,
JOHN F. O'SULLIVAN,
Attorney for Appellants.